UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

DEC 23 2015

Ms. Shari Meghreblian, Ph.D.
Deputy Commissioner
Bureau of Environment
Tennessee Department of Environment
and Conservation
312 Rosa L. Parks Avenue
Nashville, Tennessee 37243

Dear Ms. Meghreblian:

The Environmental Protection Agency is aware of concerns expressed by stakeholders in Tennessee with regard to certain National Pollutant Discharge Elimination System (NPDES) permit requirements developed by TDEC in its Municipal Separate Storm Sewer System (MS4) permits. Specifically, we understand that some stakeholders have raised objections to including runoff reduction requirements for new development and redevelopment activities in Tennessee, asserting that the EPA and state permitting authorities lack legal authority to include such conditions. At your request, I would like to take this opportunity to respond to those concerns and make clear the legal basis for such permit requirements. In particular, I will address four specific issues: (1) the legal basis for runoff reduction requirements; (2) the assertion that the Clean Water Act (CWA) only addresses discharges *from* as opposed to *into* an MS4 system; (3) the assertion that a retention requirement exceeds NPDES authority because it regulates "flow" rather than pollutants; and (4) the assertion that *Virginia Department of Transportation v. EPA*, precludes the use of stormwater retention requirements or stormwater flow reduction practices.

The existing TDEC permit condition at issue requires permitted MS4s to control stormwater discharges by managing on-site, at a minimum, the first inch of every rainfall event preceded by 72 hours of no measurable precipitation. This first inch of rainfall must be 100% managed with no stormwater runoff being discharged to surface waters. Green infrastructure measures that infiltrate, evapotranspire, or harvest and use precipitation on site are an increasingly popular method of stormwater management to achieve such retention requirements. The permit also includes a number of flexibilities in connection with these requirements. For example, the permit incentivizes certain types of redevelopment by relaxing the stormwater retention requirement for high density, mixed-use, or transit-oriented development. In addition, there are flexibilities whereby sites that cannot fully accomplish the stormwater retention requirement on-site may propose off-site mitigation or payment into a fund for stormwater projects.

(1) The legal basis for runoff reduction requirements

Section 402(p)(3)(B)(iii) of the CWA provides that MS4 permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." The permit condition at issue is a "management practice" and/or a "control technique." Further, the statute authorizes "such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." The retention requirement in the permit has a clear connection with the reduction of pollutant discharge. There is a strong factual and scientific basis for finding that such retention best management practices have beneficial water quality and pollutant reduction impacts.[1] Moreover, the existence and successful implementation of such requirements in many jurisdictions indicates that such measures are generally "practicable" to implement.[2] Indeed, there are jurisdictions in Tennessee that are successfully implementing the retention requirement. Therefore, we believe the permit conditions developed by TDEC fit squarely within the scope of the CWA's NPDES permitting authority.

In addition to the statutory requirement that MS4 permits require controls to reduce the discharge of pollutants to the maximum extent practicable, NPDES regulations implementing the statute require that such controls include measures to address pollutants discharged from developed and redeveloped sites following construction. For example, regulations applicable to Phase 1 (large and medium) MS4s require "controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment." 40 CFR § 122.26(d)(2)(iv)(A)(2). This regulation further provides that the requirement for a program to control pollution from new development and significant redevelopment must "address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed." Similarly, the regulations applicable to Phase 2 (small) MS4s require the development and implementation of "a program to address storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre." 40 CFR § 122.34(b)(5). The stormwater retention requirement for new and redeveloped sites that TDEC has included in its MS4 permits is the type of control that is contemplated by these regulations.

(2) The assertion that the CWA only addresses discharges *from* as opposed to *into* an MS4 system

We understand that some concerns have been raised with regard to controls on discharges of pollutants *into* the MS4 instead of controls which address discharges of pollutants *from* the MS4. Section 402(p)(3)(B) plainly contemplates controls into the MS4 as an effective way to control what the MS4 discharges, as opposed to end-of-pipe limits. For example, section 402(p)(3)(B)(ii) requires that MS4

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[1] The National Research Council issued a 2009 report (Urban Stormwater Management in the United States) evaluating EPA's stormwater management program. See http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=12465.

[2] At least 17 states and the District of Columbia have already implemented retention performance requirements for newly developed and redeveloped sites, and the EPA believes that retention requirements are well within the MEP framework. Those states include VT, NJ, NY, DE, MD, PA, WV, FL, SC, WI, MT, CA, AK, OR, WA, MA, NH, and DC. For additional information, see Summary of State Stormwater Standards (EPA, 2011) at http://www3.epa.gov/npdes/pubs/sw_state_summary_standards.pdf and Post-Construction Performance Standards & Water Quality-Based Requirements (EPA, 2014) at http://www.epa.gov/sites/production/files/2015-11/documents/sw_ms4_compendium.pdf .

permits "shall include requirements to effectively prohibit non-stormwater discharges *into the storm sewers.*" Section 402(p)(3)(B)(iii) includes the requirement that MS4 permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator deems appropriate . . . ." Pollution prevention (as opposed to end-of-pipe treatment) is a well-established practice, control technique or other provision to control such pollutants. In implementing this authority, the preamble to the Phase 2 stormwater rule refers to studies and investigations indicating that "prior planning and designing for the minimization of pollutants in storm water discharges is the most cost-effective approach to storm water quality management. Reducing pollutant concentrations in the storm water after the discharge enters a storm sewer system is often more expensive and less efficient than preventing or reducing pollutants at the source." 64 Fed. Reg. 68722, at 68759 (Dec. 8, 1999). Further the preamble states "the requirement for small MS4 operators to develop a program to address discharges resulting from new development and redevelopment is essentially a pollution prevention measure." 64 Fed. Reg. 68722, at 68761 (Dec. 8, 1999). Post-construction measures, such as the retention requirement, are cost-effective pollution prevention measures to reduce pollutants entering an MS4.

(3) The assertion that a retention requirement exceeds NPDES authority because it regulates "flow"

We understand there is opposition to the permit requirements, contending that a retention requirement exceeds NPDES authority because it seeks to regulate "flow" rather than pollutants, and only pollutants may be controlled by an NPDES permit. The purpose of a retention requirement in an NPDES MS4 permit is to reduce pollutant discharge to the maximum extent practicable in accordance with the statute and regulations. As noted above, Section 402(p)(3)(B)(iii) of the CWA lists a variety of ways for MS4 permits to regulate the discharge of pollutants in stormwater. Further, the EPA noted in the Phase 2 stormwater rule preamble with respect to the post-construction minimum control measure: "In many cases, consideration of the increased flow rate, velocity and energy of storm water discharges following development unavoidably must be taken into consideration in order to reduce the discharge of pollutants, to meet water quality permit conditions and to prevent degradation of receiving streams." 64 Fed. Reg. 68722, at 68761 (Dec. 8, 1999).

(4) The assertion that *Virginia Department of Transportation v. EPA* precludes the use of stormwater retention requirements

Some stakeholders cite to a case involving the section of the CWA authorizing Total Maximum Daily Loads (TMDLs) as support for the argument that the CWA does not authorize stormwater retention requirements or any kind of stormwater flow reduction requirement in NPDES MS4 permits. That case, *Virginia Department of Transportation v. EPA*, 2013 U.S. Dist. LEXIS 981 (E.D.Va. Jan 3, 2013), struck down a TMDL that expressed a load allocation and wasteload allocations for sediment in terms of stormwater flow rate based on the EPA's view that the flow rate from storm events served as a surrogate for sediment pollutant loads. The court held that this was not authorized because the statutory section authorizing TMDLs, CWA Section 303(d)(1)(C), specifically requires the setting of a TMDL "for those pollutants which the Administrator identifies ... as suitable for such calculation." Since the court's decision turned on the specific language of Section 303(d)(1)(C), it has no bearing on the EPA's authority to regulate "stormwater discharges," as expressly required under CWA Section 402(p)(6), or to require various types of controls under CWA Section 402(p)(3)(B)(iii). For more explanation on the EPA's authority to require retention requirements in MS4 permits, see the EPA's briefs before EPA's

Environmental Appeals Board defending two EPA-issued permits to MS4s at Department of Defense facilities in Regions 8 and 10.[3]

If you should have any questions, or would like to discuss this letter further, please contact me at (404) 562-9470, or have your staff contact Ms. Mary Kuo at (404) 562-9847.

Sincerely,

James D. Giattina
Director
Water Protection Division

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3 http://yosemite.epa.gov/oa/eab_web_docket.nsf/Filings%20By%20Appeal%20Number/4CEBE347DDC7341485257C4300509261/$File/2013-12-13%20FINAL%20Buckley%20Response%20Brief.pdf (Buckley Air Force Base Muncipal Separate Storm Sewer System); http://yosemite.epa.gov/oa/eab_web_docket.nsf/Filings%20By%20Appeal%20Number/F5E7F66427F9D63E85257C62005086DF/$File/Region%2010%20Response%20Brief%20(FILED).pdf (Joint Base Lewis McChord Muncipal Separate Storm Sewer System)